In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 609

WILLIAM CLAYTON PIERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on July 2, 1969. A petition for rehearing was denied August 20, 1969. The petition for a writ of certiorari was filed on September 18, 1969.

Petitioner was convicted by a jury in the United States District Court for the Southern District of Texas for passing and selling counterfeit money, in violation of 18 U.S.C. 472, 473, and was sentenced to imprisonment for ten years (R. 1-5, 68). The court of appeals affirmed (Pet. Ex. A).

Petitioner claims as error the refusal of the trial court to give an entrapment instruction. The evidence showed that on May 21, 1966, a Secret Service agent secured through an informant, Lee, an introduction, under an assumed name, to petitioner at the latter's automobile wrecking shop in Houston, Texas. After an exchange of greetings, petitioner and the agent freely discussed the agent's interest in obtaining some counterfeit money. The agent asked to see a sample. Petitioner said he had none, but to call around eleven o'clock the next morning (Tr. 53-61).

The agent and Lee went to petitioner's shop the next day at about 1:00 p.m. Petitioner said that he had contacted his source, in Oklahoma City, and that he should receive a sample by special delivery the following day around 11:00 a.m. The three men then drove to a restaurant, where they ate and drank until about four o'clock (Tr. 62-63).

The following day, May 23, after making a call to petitioner, the agent drove to his shop. Petitioner said, "It came right after you all called." He then presented a folded sheet of yellow lined paper, inside of which were two twenty-dollar counterfeit Federal Reserve notes. After comparing the samples with a genuine bill, the agent complimented petitioner and asked if all the notes were like that. Petitioner assured him that they were and gave him the samples without charge (Tr. 64-69). After discussing price, the agent offered to buy a thousand dollars worth of the notes. Petitioner did not give him a final answer, but said that he could be reached either at his shop or at two other telephone numbers which he gave the agent (Tr. 70-74; G.E. 1-3).

A succession of delays in consummating a purchase ensued, during which the agent made numerous telephone calls to petitioner. After petitioner, on May 25 and 28, had made promises of delivery, he said, on May 29, that the deal had fallen through; that things were "getting hot" where the notes were made, but the agent should call the next week (Tr. 140-142). Eventually a deal was agreed upon for the purchase of $10,000 in counterfeit notes, at a price of $3,500 (Tr. 142-148). Following additional delays, occasioned in part by suspicions on the part of petitioner's connection regarding the agent, arrangements were made final for the promised delivery (Tr. 149-153).

On August 12, the agent drove to the Houston airport and called petitioner, saying that he had just arrived by plane and would like to deal at the airport. Petitioner delivered $10,000 in counterfeit twenty-dollar notes and the agent paid petitioner $3,500. Secret service agents then closed in and made the arrest, seizing both the counterfeit and the official funds used for the purchase (Tr. 155-161).

At the conclusion of all the evidence, petitioner requested that the court give an instruction on entrapment.[1] Nothing in the evidence, however, con-

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[1] If petitioner submitted a proposed instruction, it does not appear in the record. The reasons his counsel gave for requesting such an instruction were (Tr. 372-373):

> The charge I am interested in is entrapment. The large number of telephone calls that were made by this witness to Mr. Pierce, the fact he only responded one time, the long time this alleged conspiracy continued, the fact he didn't have the money when Mr. Lee introduced

tradicts the government agent's testimony, or otherwise discloses the slightest reluctance on petitioner's part to sell counterfeit currency. The delays that occurred were brought about by petitioner's connection, who feared detection. Petitioner himself approached the subject of an unlawful sale without hesitation and took immediate steps to supply a sample of the finished product. As the court of appeals pointed out, "the agent's uncontradicted testimony was that, from the time of the first overture, Pierce was trying to work out a sale of the counterfeit product" (Pet. Ex. A 12).

The fact that government agents afford opportunities or facilities for the commission of an offense does not constitute entrapment. *Sorrells* v. *United States*, 287 U.S. 435, 441; *Sherman* v. *United States*, 356 U.S. 369, 372; *Lopez* v. *United States*, 373 U.S. 427, 436; *Lewis* v. *United States*, 385 U.S. 206, 208. Petitioner's argument essentially rests on the proposition that the jury might have disbelieved the government agent's version of events. But if no proof suggests a basis for such disbelief, no instruction on entrapment is appropriate. *United States* v. *Giuliano*, 383 F. 2d 30, 35 (C.A. 3), certiorari denied, 389 U.S. 1055; *United States* v. *McMillan*, 368 F. 2d 810, 812 (C.A. 2), certiorari denied, 386 U.S. 909;

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the agent to him. I think it is an obvious inference from the evidence that Mr. Lee may have been using Mr. Pierce as a so-called patsy in this case and that Mr. Pierce is merely a front man for this and that he was not really in possession of the money until Mr. Lee gave him some.

United States v. *Bishop*, 367 F. 2d 806, 810 (C.A. 2); *United States* v. *Riley*, 363 F. 2d 955, 959 (C.A. 2); *United States* v. *Berry*, 362 F. 2d 756, 758 (C.A. 2); *Berry* v. *United States*, 324 F. 2d 407, 408-409 (C.A. D.C.), certiorari denied, 376 U.S. 959; *Brainin* v. *United States*, 314 F. 2d 460 (C.A. 5); *Hester* v. *United States*, 303 F. 2d 47, 48-49 (C.A. 10), certiorari denied, 371 U.S. 847. Whatever differences in approach there may be among the circuits with regard to the giving of an entrapment instruction, they are not raised in the factual circumstances of this case.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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